



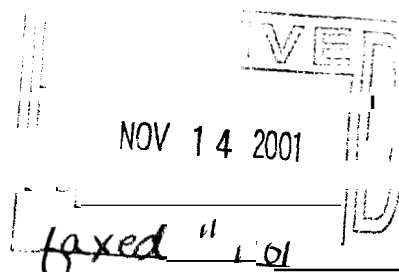
# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240

NOV 1 2001

In Reply Refer To:  
ER 01/625

National Marine Fisheries Service  
Office of Protected Resources, Permits Division (F/PR1)  
Attention: Ms. *Ann* Terbush  
1315 East-West Highway, Room 13705  
Silver Spring, Maryland 20910




Dear Ms. Terbush:

The Department of the Interior has reviewed the Proposed Rule to Amend the Regulations for Permits to Capture or Import Marine Mammals for Purposes of Public Display under the Marine Mammal Protection Act of 1972 (MMPA). The Proposed Rule was published on July 3, 2001, in the ***Federal Register***. We appreciate the opportunity to review the document and submit these comments. Additional general comments and specific comments are included in an enclosure to this letter.

Under a Memorandum of Agreement (MOA), among the Department's Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), and the Animal and Plant Health Inspection Service, effective August 1, 1998, we agreed to "... facilitate and promote the consistent, effective, and cooperative implementation of all standards governing ... marine mammals, both pursuant to their take or import, and during their captivity ...". Unfortunately, the intent of the MOA for coordination was not realized for this proposed rule. The FWS was not afforded the opportunity to review and comment on this proposed rule to address and resolve any differences in form, substance, or interpretation prior to its publication. We therefore request that NMFS work more closely with the FWS prior to the publication of any future proposed rules for which we share cooperative and joint implementation responsibilities under the MMPA.

If you have any questions regarding these comments, please contact Ken Havran in the Office of Environmental Policy and Compliance at (202) 208-7116 or Charlie Chandler, Chief, Branch of Permits, Division of Management Authority, FWS, at 703/358-2104, ext. 6729.

Sincerely, 

 Willie R. Taylor   
Director  
Office of Environmental Policy  
and Compliance

Enclosure

**U.S. Department of the Interior Comments on the Proposed Rule to Amend the Regulations for Permits to Capture or Import Marine Mammals for Purposes of Public Display under the Marine Mammal Protection Act of 1972 (MMPA)**

GENERAL COMMENTS

**Prior coordination with the Fish and Wildlife Service (FWS):** We are concerned and disappointed that the National Marine Fisheries Service (NMFS) published this proposed rule on public display permits without affording the FWS the opportunity to review and comment before it went out for review by the public. Because the FWS and NMFS share responsibility for the administration and enforcement of the MMPA, it is important that we share the same interpretation of the law. Under our Memorandum of Agreement (MOA), effective August 1, 1998, we agreed to “. . . facilitate and promote the consistent, effective, and cooperative implementation of all standards governing . . . marine mammals . . .” We think that NMFS failed to abide by the intent of the MOA and, thus, the two agencies did not work out substantial differences in interpretation of the Act before putting the proposed rule in the public arena. We request that NMFS work with us to resolve our differences prior to the publication of a final rule.

**Organization:** The preamble does not cite or follow the order of the regulations, making it difficult for the public and cooperators to identify which sections of the regulations are pertinent when general subjects are discussed. We recommend the addition of references to applicable sections of the regulation in the preamble of the final rule. This would allow the reviewer to link the discussion in the preamble with the specific section of the regulation. We also recommend that applicable sections of the MMPA be referenced in the preamble. Further, we note that some significant provisions of the proposed regulations are not discussed in the preamble. We recommend expanding the preamble to include a discussion on the rationale and reasons for these other provisions as indicated in our comments.

**Definition of “capture”:** The proposed rule makes reference to permits to “capture” marine mammals. However, the MMPA authorizes permits for “take,” with “capture” being included under the definition of “take.” We recommend that a statement be added in the preamble to clarify the reason and under what circumstances NMFS is using “capture,” instead of “take.”

SPECIFIC COMMENTS

**§ 216.13(d) - Prohibited uses . . . :** We recommend text be added to the first sentence in the second paragraph of section 3 of the preamble (page 35209, column 3) to clarify which captive marine mammals may not be released into the wild without a permit.



foreign facilities. Rather the proposed rule only allows captive-held animals previously permitted for public display to be exported (see § 216.43(f)). This is a substantially different interpretation from ours and a major disagreement between FWS, NMFS, and the Marine Mammal Commission. Based on a plain language reading, we interpret the MMPA to allow the take from the wild and export for public display. We do not believe it was Congress' intent to preclude foreign facilities from obtaining wild marine mammals for *bona fide* public display purposes merely because these facilities are not based in the United States.

Our policy and interpretation of Section 104(c)(2)(A) of the MMPA allows for a take permit to be issued to a foreign-based applicant with concurrent authorization for export provided the foreign facility can meet standards that are comparable to the AWA requirements as provided in Section 104(c)(9) of the MMPA. Recognizing that foreign facilities cannot be licensed under the AWA, we consult with APHIS to determine a foreign facility's ability to meet comparability requirements of the AWA as stipulated under Section 104(c)(9). If **APHIS** deems a foreign facility comparable with the standards required for permitting for public display under the AWA, a comity statement is supplied by the foreign government and a permit may be issued for the take and subsequent export when all other requirements for public display under the MMPA are met. Therefore, we do not agree that only captive-held animals previously permitted for public display should be allowed to be exported and strongly urge you to revise the regulation to set out procedures for take of marine mammals for export **as** allowed under the MMPA.

**§ 216.43(b)(3)(iv) - Issuance criteria:** We believe the word "practicable" is incorrectly used in the phrase ". . . will present the least practicable effect on wild populations." We suggest changing the text to ". . . one that potentially will have the least adverse effect on wild populations."

**§ 216.43(b)(4)(ii)(A) - Permit restrictions:** The preamble needs to clearly state how the proposed regulation applies to marine mammals listed under the Endangered Species Act (ESA) or designated as depleted species under the MMPA. Paragraph 216.43(b)(4)(ii)(A) stipulates that capture or import is not authorized for depleted species or stocks (with an exception for captive-born imports). This prohibition for depleted species, however, is not discussed in the preamble and is given as a permit condition in the proposed regulations. Since a permit would not be issued for public display of ESA-listed or depleted species, we do not believe it is appropriate to make this provision a permit condition. Therefore, we recommend that a statement be added in the preamble under "General Requirements" (page 35210, columns 2 and/or 3) to clarify that the public display regulations do not apply to depleted or ESA-listed species, and that §216.43(b)(4)(ii)(A) be moved to § 216.43(a) – "General Public Display Requirements" as the more appropriate placement of this paragraph.

We do not agree with the exception given in the proposed regulation that would allow the granting of public display permits to import captive-born depleted species that meet the requirements for enhancement. We agree with your current regulations concerning public display of marine mammals held under the authority of an enhancement permit at §

216.41(b)(6)(v), but do not believe the MMPA allows the issuance of a public display permit for depleted marine mammals, even ones born outside the United States. We also believe the proposed exception is confusing. It would treat captive-born depleted marine mammals born in the United States (not eligible for a public display permit) differently from those that are foreign-born (would be eligible for a public display permit under the proposed exemption). We urge you to delete this provision from the final rule and instead reference the enhancement permit regulation at § 216.41(b)(6)(v) that allows public display under specific conditions.

**§ 216.43(b)(5)(ii)- Permit conditions:** Insert the citation for the CITES regulations, “50 CFR part 23.”

**§ 216.43(b)(5)(vii) - Permit conditions:** The preamble needs to explain the need for this provision concerning the holding of marine mammals captured from the wild in a temporary facility for acclimation. Since current regulations define “facility” as a permanent primary enclosure, we question the logic of a “temporary” facility. Also, we are only familiar with holding facilities where the sole purpose is the acclimation of rehabilitated marine mammals for release back into the wild. As written, however, it appears to exclude rehabilitation facilities. The reference to AWA standards is problematic. The NMFS should clarify who will be making the determination that AWA standards are met. We currently review care and maintenance as part of the permit to take and acclimate marine mammals and require a written certification of a licensed veterinarian knowledgeable in the field of marine mammals to ensure that the care is adequate to provide for the well-being of the animal. Although the application is reviewed by APHIS, we make the decision based on the species, where collected, etc.

**§216.43(c) - Re-export of marine mammals imported into the United States:** We agree that the original foreign holder and foreign facility importing marine mammals, with the intention of re-exporting such animals back to the original foreign facility, should not have to submit foreign certifications. We suggest, however, you clarify in the preamble what, if any, comparability standards that foreign facilities would have to meet under the provisions of section 104(c)(2)(B)(ii)(I) of the Act, and if you would require such information at the time an import permit is being processed.

**§ 216.43(e) - Notifications and reporting:** Paragraphs (1) through (7) of this section refer to notifications being provided to the NMFS Office Director; however, paragraph (8) specifies that 30 days after publication of the final rule, all transfer and transport notifications and inventory reports must be submitted to the International Species Information System (ISIS). This is very confusing to the reader and should be clarified.

**§ 216.43(e)(1)(iii) - Notifications and reporting; 15-day notification:** The last sentence of the first paragraph of section 9 of the preamble (page 35212, column 3) indicates a holder must submit a new transport notification if animals are not transferred within 60 days after the planned transfer. The regulations stipulate 90 days. Also, since transport notifications are unique to individual specimens, we suggest this sentence be revised to add the word “specimen” as follows:

“Holders . . . are not transferred within 90 days after the planned transfer date, if the species or specimens to be transported changed or increased . . .”

We suggest you explain in the preamble the need to submit notification for short-term transports of marine mammals for school visits or outreach.

**§ 216.43(e)(4)(vii) - Notifications and reporting; Marine mammal inventory:** This section requires notification of any animal that undergoes euthanasia. However, there is no discussion in the preamble or any further guidance in the regulations regarding under what circumstances and by whom an animal held for public display can be euthanized. Additional guidance needs to be included in the regulations that allow euthanasia only for the welfare or protection of the animal after consultation with NMFS (or a licensed veterinarian with knowledge of marine mammals).

**§216.43(f) - Export of captive marine mammals** (Also see comments above under §216.43(b)(3)): In the fourth paragraph of section 12 of the preamble (page 35213, column 3), the MMPA section references should be corrected to read 104(c)(2)(B), 104(c)(2)(C), and 104(c)(9).

In §216.43(f)(2), the regulations state that persons intending to receive marine mammals for public display must meet the public display criteria at §216.43(b)(3)(i) through (iii). However, §216.43(b)(3)(ii) requires the applicant to be registered or licensed under the AWA. Recognizing that foreign facilities are unable to meet this requirement, we recommend the following be added to the end of §216.43(b)(3)(ii): “...subpart E; or for foreign applicants, the receiving facility meets standards comparable to those applicable to U.S. licensees and registrants under the AWA,  
7 U.S.C. 2131 *et seq.*”

**Table 1:** Although the preamble refers to Table 1 (page 35219) for an outline of the types of inventory/transfer submissions and the locations for submission, the regulations do not. We recommend adding introductory text explaining Table 1 in § 216.43(e). In addition, not all of the types of submissions required in § 216.43(e) are listed in the table (e.g., releases or escapes, etc.) and the description names in the regulations often do not match those in the table.

The table would be more user friendly if the “topics” and “time” were separated into separate columns. The “Main Topic” should be left justified and put in alphabetical order (i.e., Amendment, application; Application, permit; Birth and Death Report; Certification, Foreign Government; Collection Report, Inventory Updates, etc.).